UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

FEB 4 1997

OFFICE OF
ENFORCEMENT AND
COMPLIANCE ASSURANCE

MEMORANDUM

SUBJECT: **Draft Guidance on EPA's New Penalty Order Authority Against Federal Facilities Under the Safe Drinking Water Act Amendments (SDWA) of 1996**

FROM: **Craig Hooks, Acting Director**
Federal Facilities Enforcement Office

TO: **Addressees**

On August 6, 1996, the Safe Drinking Water Act (SDWA) Amendments of 1996, Pub. Law No. 104-182, became law. The Amendments contain provisions specific to enforcement at Federal Facilities including: (1) a new waiver of sovereign immunity that subjects Federal agencies to penalties for violations of SDWA requirements, (2) EPA administrative penalty order authority against Federal facilities, (3) a new provision to provide for judicial review of EPA penalty orders against Federal facilities, and (4) an amendment to the citizen suit provisions to compel Federal agencies to pay overdue penalties assessed by EPA.

The purpose of this memorandum is to explain these new provisions and to provide guidance on the use of the Agency's authority to issue penalty orders against Federal facilities. The guidance also solicits comment on three options and whether we should select one option or use all three under different circumstances when integrating the new penalty order authority with EPA's other administrative enforcement authorities. Please provide comments on this guidance to Sally Dalzell by February 27, 1997.

Background

Prior to the Amendments, the waiver of sovereign immunity at § 1447(a) provided that each Federal agency "shall be subject to, and comply with, all Federal, State, interstate, and local requirements, administrative authorities, and process and sanctions . . . in the same manner, and to the same extent, as any nongovernmental entity." However, it was not clear whether this provision subjected Federal agencies to penalties for violations of the law, because the waiver language contained in the SDWA was similar to the waiver contained in the Clean Water Act

(CWA). In Department of Energy v. Ohio[1], the Supreme Court held that the waivers under the CWA and the Resource Conservation and Recovery Act (RCRA) were not sufficient to subject Federal agencies to penalties for past violations of the laws. Therefore, EPA historically has negotiated compliance agreements or consent orders without penalties to bring Federal facilities into compliance.

In 1992, Congress enacted the Federal Facility Compliance Act (FFCA) as an amendment to RCRA. The FFCA amended the waiver of sovereign immunity in RCRA to make it clear that Federal agencies are subject to both civil and administrative penalties for violations of RCRA.[2] However, since this law applied only to RCRA, it remained unclear as to whether Federal agencies were subject to penalties for violations of the SDWA.

I. Federal Facility Provisions Under the Amendments

Using language virtually identical to the FFCA, Congress strengthened the waiver of sovereign immunity at § 1447(a) of the SDWA to make it clear that Federal agencies are subject to penalties for past violations of the law:

> Each department . . . of the Federal Government . . . shall be subject to, and comply with, all Federal, State, interstate, and local requirements, both substantive and procedural . . . respecting the protection of such wellhead areas, respecting such public water systems, and respecting any underground injection in the same manner and to the same extent as any person is subject to such requirements, including the payment of reasonable service charges. The Federal, State, interstate, and local substantive and procedural requirements referred to in this subsection shall include, but are not limited to, all administrative orders and all civil and administrative penalties and fines, regardless of whether such penalties or fines are punitive or coercive in nature or are imposed for isolated, intermittent, or continuing violations. The United States hereby expressly waives any immunity otherwise applicable to the United States with respect to any such substantive or procedural requirement (including, but not limited to, any injunctive relief, administrative order or civil or administrative penalty or fine referred to in the preceding sentence, or reasonable service charge). Emphasis added.

Therefore, Federal agencies are now subject to civil and administrative penalties and orders not only for violations of the public water system (PWS) requirements, but also for violations of the underground injection control (UIC) and State wellhead protection programs.

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[1] 503 U.S. 607 (1992).

[2] 42 U.S.C. § 6961(a).

The Amendments also added a provision at § 1447(c) which requires that all penalties and fines collected by a State from the Federal government be used by the State only for projects designed to improve or protect the environment or to defray the costs of environmental protection or enforcement. The only exception is where there is a state law in effect before the enactment of the Amendments or a state constitution that requires such funds be used in a different manner. Congress made it clear in legislative history[3] that it intends that any fines or penalties assessed are to be paid from an agency's appropriations and not from the Judgment Fund. This is to ensure the proper measure of accountability for Federal agencies and to help in deterring future violations.

The Amendments also added a provision at § 1447(b) that gives EPA the authority to issue a penalty order against a Federal agency for violation of an "applicable requirement" for up to $25,000 per day per violation. Like the FFCA, this new provision requires notice, opportunity for a formal hearing on the record in accordance with chapters 5 and 7 of the Administrative Procedures Act (APA), and an opportunity for the Federal agency to confer with the Administrator before the penalty order becomes final. This new penalty order authority applies only to Federal agencies. The Amendments define "applicable requirement" as requirements, regulations, or schedules under sections 1412 - National drinking water regulation, 1414 - Enforcement of drinking water regulations, 1415 - Variances, 1416 - Exemptions, 1417 - Prohibition on use of lead pipes, solder, or flux, 1441 - Assurances of availability of adequate supplies of chemicals necessary for treatment of water, and 1445 - Records and inspections. The EPA may also enforce requirements or permits issued pursuant to an approved State program under section 1413.

Section 1447(b) provides any "interested person" the opportunity to obtain judicial review of a § 1447(b) penalty order against a Federal agency in U.S. District Court within the 30-day period beginning on the date the penalty order becomes final. The court may not set aside or remand the order, unless the court finds that there is not substantial evidence in the record to support the finding or that the assessment of penalties by the Administrator constitutes an abuse of discretion. In addition, the court may not impose an additional civil penalty for the violation that is the subject of the order, unless the court finds that the assessment constitutes an abuse of discretion by the Administrator.

Finally, the Amendments added a section to the citizen suit provisions at § 1449 to provide any person the opportunity to commence a civil action in U.S. district court against any Federal agency that fails to pay a penalty assessed by the Administrator within eighteen months after the penalty order becomes final. The citizen must give the Attorney General and the Federal agency sixty days notice before commencing the suit.

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[3] H.R. No. 104-632, 104th Cong., 2nd Sess. (1996).

II. Hearing Procedures and Settlement Negotiations for § 1447(b) Penalty Orders

As stated above, § 1447(b) requires that EPA provide the Federal agency with notice and an opportunity for a formal hearing on the record in accordance with the APA. EPA's general rules of practice governing the administrative assessment of penalties are set out at 40 C.F.R Part 22. The hearing procedures contained in these regulations will be provided to Federal agencies who wish to challenge a penalty order issued pursuant to § 1447(b). In addition, the Amendments provide an opportunity for the Federal agency to confer with the Administrator before the penalty order becomes final.[4]

Settlement is encouraged in the same circumstances as with a private party and will be provided to a Federal agency. The provision for settlements is set out at 40 C.F.R. § 22.18. This provision provides an opportunity for the respondent to confer with the complainant (an EPA employee authorized to issue the complaint) concerning settlement whether or not the respondent requests a hearing. Whenever a settlement or compromise has been proposed, the parties must forward a written consent agreement and proposed order to the Regional Administrator. Cases which settle do not require a conference with the Administrator, and in settling the matter, the Federal Respondent waives its opportunity to confer with the Administrator under the Amendments.

Following the Federal agency's opportunity to confer with the EPA employee who issued the complaint as provided in 40 C.F.R. § 22.18, if EPA and the Federal agency determine that the case cannot be settled, the case will be submitted to the Part 22 hearing procedures. Settlement discussions may continue on a parallel track with hearing procedures. A case against a Federal agency proceeds as would any other compliance hearing matter pursuant to Part 22.

III. Opportunity to Confer Under § 1447(b)

The Amendment's requirement that a Federal agency be provided an opportunity to confer with the Administrator before a penalty order becomes final would be satisfied by providing an opportunity to confer with a Regional official with properly delegated authority within a reasonable time following the issuance of the order. However, consistent with guidance issued under the FFCA[5] and, as a matter of policy, the Administrator will retain the opportunity to confer personally as described below.

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[4] The Administrator's obligation to provide an opportunity to confer is only in connection with EPA-issued orders, not State orders. Therefore, EPA will not confer with Federal agencies regarding State-issued orders.

[5] See Memorandum from Steven A. Herman, Final Enforcement Guidance on Implementation of the Federal Facility Compliance Act, July 6, 1993.

Federal agencies will have the opportunity to meet with the Administrator only after exhaustion of the Part 22 procedures. Placing the conference at the end of the process will enable the regions to proceed with their enforcement case against the Federal agency in the same manner as they do against private parties. Similarly, Regions should not confer with the Federal agency outside of their usual conferring opportunity as found in the Part 22 procedures and should use the same conference and settlement procedures with Federal agencies as is used with private parties under Part 22.

Within ten (10) days of service of a final decision by the Environmental Appeals Board under 40 C.F.R. § 22.31, the Federal agency may seek further review by petitioning the Board for reconsideration under § 22.32, if it believes the Board's decision was erroneously decided. Within thirty (30) days of service of the Board's decision if no petition for reconsideration is filed or within thirty (30) days of service of the Board's final decision if a petition for reconsideration is filed, the head of the Federal agency, if it wishes to confer with the Administrator, must file a written request addressed to the Administrator to seek an opportunity to confer with the Administrator. If no written request to confer is filed within these thirty-day periods, the administrative order is final under the terms of § 1447(b)(3) of the SDWA.

In many cases, the conference might be conducted through an exchange of letters. If the conference is handled through letters, the head of the Federal agency should serve a letter to the Administrator with a copy to the Director of the Federal Facilities Enforcement Office (FFEO) and all parties/counsel of record. In addition, the letter should specifically identify the issues which the Federal agency proposes that the Administrator consider. The head of the Federal agency should also attach copies of all prior administrative decisions and briefs in the underlying proceedings. Copies of the briefs and underlying decisions should be provided to the Director of FFEO.

The head of the Federal agency, however, may prefer to request a direct meeting with the Administrator. The request for a direct conference should be served on the Administrator with a copy to the Director of FFEO and all parties/counsel of record. The request for a direct conference should specifically identify the issues which the Federal agency proposes to discuss with the Administrator, and should specifically identify who will represent the Federal agency. In addition, as part of its request for a direct conference, the head of the Federal agency should attach copies of all prior administrative decisions and briefs in the underlying proceedings. Copies of the briefs and underlying decisions should also be provided to the Director of the FFEO.

The parties/counsel of record may request to be present during the direct conference. This request to attend the direct conference, likewise, should be in writing and served on the Director of FFEO and the parties/counsel of record. The Administrator or her designee shall notify the head of the Federal agency who requested the direct conference and the parties/counsel of record regarding her plan and arrangements for the direct conference.

Following the conclusion of the direct conference, a person designated by the Administrator will provide a written summary of the issues discussed and addressed. Copies of the written summary will be provided to the parties/counsel of record. Ordinarily, within thirty (30) days of the conference, or within thirty (30) days following the receipt of the letter from the head of the Federal agency in the event of no direct conference, the Administrator shall issue a written decision with appropriate instruction regarding the finality of the order. This decision shall be filed with the Regional Hearing clerk and made part of the administrative case file.

If the Board referred the matter to the Administrator for decision under § 22.04(a) rather than deciding the matter itself and if the Federal agency wants to request a conference with the Administrator, the Federal agency must do so prior to the Administrator's decision. To assure that federal agencies are aware of these procedures, Regions should draw responding agencies' attention to Part 22 and this and any other relevant Agency guidance.

IV. Penalties Under § 1447(b)

Section 1447(a) of the Amendments states that the Federal Government is subject to all civil and administrative penalties and fines, regardless of whether such penalties or fines are punitive or coercive in nature or imposed for isolated, intermittent, or continuing violations. As a matter of policy, EPA will pursue penalties only from the effective date of the Amendments forward. If violations occurred prior to the effective date and are ongoing, EPA could assess penalties for the violations from August 6, 1996 until correction of the violation.

In summary, the Federal government is liable for SDWA civil and administrative penalties just like any other person (with the exception of the effective date of the Act limitation). Since the law and the Congressional intent state that Federal agencies are liable for penalties, EPA will apply its applicable penalty policy, presently the Public Water System Supervision Program Settlement Penalty Policy for Civil Judicial Actions and Administrative Complaints for Penalties (effective May, 25, 1994) against the Federal government for violations of the SDWA in the same manner and to the same extent as any private party[6] The Regions should also inform the Federal agency that they may be subject to a citizen's suit for failure to pay the penalty, if the payment is not received by EPA within 18 months of the final order. The May 8, 1995 "Interim Revised EPA Supplemental Enforcement Projects Policy" also applies in this context. Moreover, due to the unique nature of Federal facility penalties under 1447(b), for settled cases that require compliance work, stipulated penalties should be included in the Consent Agreement and Consent Order.

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[6] Because the Anti-Deficiency Act, 31 U.S.C. § 1341, makes payments by Federal agencies subject to appropriation funds by Congress, there may be unique payment issues with regard to payment of penalties. Under the SDWA penalty policy, the burden regarding ability to pay will reside with the Federal agency as respondent.

V. Integration of § 1447(b) Penalty Orders with § 1414(g) Compliance Orders

EPA's general enforcement authority that applies to non-Federal PWSs is at § 1414(g) of the SDWA. If a PWS is in violation of an applicable requirement, EPA may issue an administrative compliance order under § 1414(g). Under the old SDWA, the order could not take effect until after notice and an opportunity for a public hearing. The Amendments deleted this requirement. Therefore, EPA plans to modify its regulations under 40 CFR Section 142(J) so that they are consistent with the new amendments. Once the changes are in place, EPA will will proceed directly to a final compliance order.[7] If the PWS fails to comply with the compliance order, EPA may then assess a penalty of not more than $25,000 per day of violation under § 1414(g)(3). If the total penalty amount is between $5,000 and $25,000, EPA must give the violator notice and an opportunity for a formal APA hearing on the record. If the total penalty is less than $5,000, EPA needs only to give the violator notice and an opportunity for a public hearing, unless a formal APA hearing is requested. If the total penalty exceeds $25,000, the penalty must be assessed by a civil action brought by the Administrator in district court.

Therefore, EPA has two administrative enforcement procedures available against Federal facilities that violate PWS requirements. First, under § 1447(b), EPA may issue a penalty order assessing up to $25,000 per day per violation against a Federal agency. Second, EPA may issue a compliance order under § 1414(g). Three options have been proposed to integrate EPA's administrative enforcement authorities under these two sections. The first option is to issue a § 1414(g) compliance order only and then issue a § 1447(b) penalty order, if the Federal agency fails to comply with the compliance order. The second is to issue a § 1447(b) penalty order only. The third is to issue a § 1414(g) compliance order and a § 1447(b) penalty order at the same time. As stated above, consider whether one option or use of all three under different circumstances should govern the kind of enforcement actions EPA takes.

Option 1 - § 1414(g) Compliance Order Only

Under this option, EPA would issue a § 1414(g) compliance order only. If the Federal agency failed to comply with the compliance order EPA would then issue a penalty order under § 1447(b). Section 1447(b) states that the Administrator may assess a penalty against a Federal agency for a violation of an "applicable requirement." As stated above, the Amendments define an "applicable requirement" as including a requirement under § 1414.

Since the penalty order authority under § 1447(b) was given only to EPA to be applied

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[7] In a primacy State, EPA must first give the State notice and then may take action if the state has not commenced an enforcement action within thirty days. In a non-primacy State, EPA must notify the appropriate elected official before taking an enforcement action. EPA is interpreting this to mean that EPA may notify an official in a non-primacy State at the same time EPA issues the order.

specifically and exclusively to Federal agencies, EPA will use this penalty order authority instead of the order authority at § 1414(g)(3) for violations of § 1414(g) compliance orders. Another reason for choosing § 1447(b) is that it allows EPA to seek greater penalties when the circumstances warrant against Federal facilities on par with private party actions in the civil judicial context. As stated earlier, § 1447(b) authorizes EPA to seek up to $25,000 per day per violation against a Federal facility with no limit, while administrative penalties under § 1414(g)(3) are limited to a total of $25,000.

EPA is proposing to provide the Head of the Federal agency an opportunity to confer with the Administrator within 30 days after the order is issued before the order becomes final.[8] This will ensure consistency with the requirements for an opportunity to confer under § 1447(b) of the SDWA and with § 6001(b) of RCRA as amended by the FFCA[9] and will satisfy Constitutional requirements for resolution of interagency disputes within the Executive Branch.[10]

This approach is consistent with EPA's historical practice against private parties; however, there are several differences with the Federal facility program which may warrant using this approach only in limited circumstances. The unitary executive theory and the opportunity to confer with the Administrator are two major differences from our typical private party enforcement program. The opportunity to confer is somewhat analogous to a review by an Administrative Law Judge without the assistance of rules of procedures.

Circumstances that may warrant only an order in the Federal facility context are those such as where a facility has an exemplary compliance record or where the requirements from which the violations arise are so new that it may be considered unfair to assess a penalty until the regulated community becomes more familiar with those requirements.

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[8] In providing this opportunity, FFEO is aware of the fact that § 1414(g) does not provide notice of an opportunity for a public hearing before the compliance order becomes final. In fact, the Amendments deleted this requirement presumably to streamline the enforcement process.

[9]Section 6001(b) states that no administrative order, whether it be a compliance order or a penalty order, shall become final until the Federal agency has had the opportunity to confer with the Administrator. See 40 CFR Part 22 - Hazardous Waste: Technical Revision for the Federal Facility Compliance Act of 1992 Amendments; Final Rule, 61 Fed. Reg. 11090 (March 18, 1996).

[10] See, Environmental Compliance by Federal Agencies: Hearings Before the Subcomm. On Oversight and Investigations of the House Comm. On Energy and Commerce, 100th Cong., ist Sess. (1987) (Statement of F. Henry Habicht II, Assistant Attorney General, Land and Natural resources Division). Page 29 of the testimony states, "Accordingly, Executive Branch agencies may not sue one another, nor may one agency be ordered by another to comply with an administrative order without the opportunity to contest the order within the Executive Branch."

Option 2 - § 1447(b) Penalty Order Only

The second option involves a §1447(b) penalty order only without a § 1414(g) compliance order. This option would be appropriate for cases where the Federal PWS has already corrected the violation by the time EPA discovers the violation or issues the compliance order. In this case, a compliance order might not be appropriate, since the PWS has come into compliance or remedied the violation, but the nature or severity of the violation justifies a penalty.

Option 3 - Simultaneous § 1414(g) Compliance Order and § 1447(b) Penalty Order

Under this option, EPA would issue an order requiring the agency to come into compliance under § 1414(g) and would also assess a penalty under § 1447(b) for violation of the applicable PWS requirement. The Regions may choose to issue these orders separately or combine them into a single document.

EPA generally issues compliance orders and penalty orders separately under the CWA.[11] Compliance orders under § 309(a) of the CWA do not require an opportunity for a hearing like § 309(g) penalty orders do. The primary reason to separate the two orders is to avoid having a compliance order subject to adjudication in conjunction with the penalty order. The guidance asserts that having compliance orders subject to review could slow the compliance process. There is statutory similarity between the CWA and the SDWA in this area, because compliance orders under SDWA and CWA do not provide for an opportunity for a hearing while CWA and SDWA penalty orders do require an opportunity for a hearing before the penalty order becomes final.

On the other hand, RCRA compliance orders and penalty orders are often combined into a single document. Unlike the SDWA and CWA, RCRA requires an opportunity for a hearing before any order, whether it be a compliance order or penalty order, becomes final.[12] There are several advantages to this approach. Since EPA will provide a Federal agency the opportunity to confer with the Administrator before a § 1414(g) compliance order or a § 1447(b) penalty order becomes final, it may make sense for the Administrator to consider the merits of both orders together in a single document at the same time. If both orders have been combined into a single document subject to a hearing, the Administrator will then have the advantage of a complete and consolidated record in making her final decision.

As a general rule, barring the above situations where options 1 (exemplary compliance

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[11] See, Relationship of § 309(a) Compliance Orders to § 309(g) Administrative Penalty Orders.

[12] 42 U.S.C. § 6928(b).

record or new requirements) and 2 (already returned to compliance but violations merit a penalty) would apply, option three would ordinarily present EPA's primary option when taking enforcement against Federal agencies for violations of the Safe Drinking Water Act. Providing an opportunity to confer with the Administrator on two actions arising from the same set of facts seems an inefficient use of EPA resources. Moreover, a hearing on the record would assist the Administrator in reaching her decisions. Finally, having an Administrative Law Judge overseeing the case could leverage quicker resolution.

VI. Administrative Orders under the UIC Program

As stated above, the new waiver of sovereign immunity subjects Federal agencies to EPA compliance orders and penalty orders for violations of the PWS program and the UIC and State wellhead protection programs. Therefore, Federal agencies are subject to EPA enforcement authorities under both the PWS and UIC programs. However, EPA's new penalty order authority under § 1447(b) applies only to violations of an "applicable requirement" of the SDWA. As stated above, the term "applicable requirement" is defined as including requirements of the PWS program.

However, since the waiver of sovereign immunity applies to violations of the UIC program, EPA may issue administrative orders against Federal agencies under the general UIC enforcement provisions at § 1423(c). Section 1423(c) authorizes the Administrator to issue compliance orders and penalty orders of not more than $10,000 for each day of violation up to a maximum total penalty of $125,000 for violations of any UIC regulation except for those relating to underground injection of brine or other fluids brought to the surface in connection with oil or natural gas production or any underground injection for the secondary or tertiary recovery of oil or natural gas. For violations of these requirements, the penalty amount is no more than $5,000 for each day of violation with a maximum total penalty of not more than $125,000.

Section 1423(c) requires the Administrator to give written notice and the opportunity to request a hearing on a compliance order or penalty order within thirty days of the date the notice is received. Section 1423 does not provide for an opportunity for a hearing in accordance with the APA like § 1447(b) penalty orders, but does provide for a reasonable opportunity to be heard and to present evidence. Section 1423 also does not explicitly provide the Federal agency a right to have an opportunity to confer with the Administrator before the order becomes final. However, EPA has the flexibility to provide a Federal agency the opportunity to confer with the Administrator before a compliance order or penalty order under § 1423(c) becomes final. Providing this opportunity would satisfy Constitutional concerns for resolution of interagency disputes within the Executive Branch.

The Agency is therefore proposing to provide the Head of a Federal agency an opportunity to confer with the Administrator before a compliance order or penalty order under this section becomes final. The Agency has 30 days from the date the order is issued to the Agency to confer with the Administrator before the order becomes final. Consistent with

enforcement of PWS requirements, it is expected that the Federal agency would exhaust any Regional administrative process before seeking a conference with the Administrator.

Conclusion

EPA is issuing this draft guidance to assist the Regions in carrying out their SDWA enforcement program. This guidance will supersede earlier guidance regarding SDWA enforcement at Federal facilities such as that found in the 1988 Federal Facilities Compliance Strategy. As with the implementation of the FFCA,[13] it may be necessary in the future to amend Part 22 to address the issue of the requirement for the opportunity to confer with the Administrator before finalizing an Environmental Appeals Board order..

Notice

This draft guidance and any internal procedures adopted for its implementation are intended solely as guidance for employees of EPA. Such guidance and procedures do not constitute rule making by the Agency and may not be relied upon to create a right or benefit, substantive or procedural, enforceable at law or equity, by any person. The Agency may take action at variance with this guidance and its internal implementing procedures.

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[13] See, 40 CFR Part 22 - Hazardous Waste: Technical Revision for the Federal Facility Compliance Act of 1992 Amendments; Final Rule, 61 Fed. Reg. 11090 (March 18, 1996).